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No. 84-150

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ELECTIONS BOARD, et al.,

Appellants,

v.

THE REPUBLICAN PARTY OF WISCONSIN, et al.,

Appellees.

ON APPEAL FROM A THREE-JUDGE COURT SITTING IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN UNDER 28 U.S.C. § 2284(a)

REPLY TO JURISDICTIONAL STATEMENT AND MOTION TO DISMISS

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This is a direct appeal under 28 U.S.C. § 1253 from an injunction entered by a three-judge federal district court on May 25, 1984, enjoining use of the reapportionment plan set forth in 1983

Wisconsin Act 29 on the ground that the plan unconstitutionally denies the right to vote for 174,000 Wisconsin citizens, where such denial is avoidable and unnecessary to repair constitutional defects in a reapportionment plan, and where less burdensome alternatives are available. For reasons stated below, Appellees move to dismiss.

QUESTION PRESENTED

Whether the two and four year delays in the right to vote for a state senator in the November 1984 general election, caused by a reapportionment plan drafted under a system of staggered senate terms constitutes an unconstitutional deprivation of the franchise.

PARTIES

The Appellees in this action (the plaintiffs in the federal district court),

are the Republican Party of Wisconsin and two individual Republican legislators, State Senator Donald S. Hanaway and State Representative Tommy G. Thompson. The League of Women Voters appears in the case as an intervening party.

The Appellants in this action (the defendants in the federal district court) include the Elections Board (the "Board"), an independent agency of the State of Wisconsin, its individual members Gary J.N. Aamodt, Thomas Palay, Eric Halverson, Esther Kaplan, Ron Monat, John Niebler, Helen Van Prooyen and Paul J. Swain, and its executive secretary, Kevin J. Kennedy.

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OPINIONS BELOW

The decision on appeal, set forth at App. 101-16, of the Appendix to Appellants' Jurisdictional Statement is reported at 585 F. Supp. 603 (1984).

CONSTITUTIONAL PROVISIONS INVOLVED

> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment, United States Constitution.

> The senators shall be elected by single districts of convenient contiguous territory, at the same time and in the same manner as members of the assembly are required to be chosen; and no assembly district shall be divided in the formation of a senate district. The senate districts shall be numbered in the regular series, and the senators shall be chosen alternately from the odd and even-numbered districts. The senators elected or holding over at the time of the adoption of this amendment shall continue in office till their successors are duly elected and qualified; and

> after the adoption of this amendment all senators shall be chosen for the term of four years.

Wis. Const. art. IV, §5.

STATEMENT OF THE CASE

The 1981-82 Wisconsin State Legislature failed to reapportion the State's legislative districts as required to correct the constitutional defects of the 1972 apportionment statute as revealed by the 1980 Federal Census. Numerous redistricting plans were introduced during regular and special sessions of the legislature, but none were successfully adopted.

The U.S. District Court for the Eastern District of Wisconsin issued its redistricting plan on June 9, 1982, (hereinafter "the court plan") after the legislature failed to enact any redistricting plan. No appeal of the court's decision was pursued.

The court plan governed the November, 1982 general election by which all 99 members of the state assembly and 17 of the 33-member state senate were elected. Over the next 9 months, five special elections were held, all under the court plan. Thus, 121 State Legislators were elected in 1982-1983 using the court plan.

More than a year after the legislature and the public accepted the court plan, the legislature added a new reapportionment plan to the 1983-1985 Biennial Budget Bill. That portion of the Budget Bill was vetoed by Governor Anthony S. Earl.

Subsequently, the governor called a special session to enact a reapportionment statute and on July 20, 1983, 1983 Wisconsin Act 29 (hereinafter "the Act") became effective. The Act radically changed the configurations of most of the

assembly and senate districts relied upon by Wisconsin voters in the 1982 general election.

On August 18, 1983, Appellees challenged the constitutionality of the Act and requested an injunction prohibiting its further use. The League of Women Voters became an intervening party, and also alleged the Act unconstitutional.

On May 25, 1984, the District Court declared the Act unconstitutional as it unnecessarily disenfranchises 173,976 Wisconsin citizens. The Act replaced a fully-implemented, constitutional apportionment plan. Thus, it was not necessary to correct any constitutional defects.

The court also noted that this unnecessary disenfranchisement could have been avoided by ordering all senators to

stand for election in 1984. Hence, less burdensome alternatives were available.

On May 29, 1984, the Petitioners appeared before the U.S. District Court to request a Stay of that court's decision. Later that same day, the court refused to stay its mandate. The Petitioners then filed an application for a Stay of the Mandate of the U.S. District Court for the Eastern District of Wisconsin to the Hon. John Paul Stevens, Associate Justice of the U.S. Supreme Court and Circuit Judge for the Seventh Circuit. Justice Stevens referred to the issue to the entire U.S. Supreme Court. The Stay of the Mandate of the Federal Court was entered by this Court on June 7, 1984, and a subsequent motion to vacate such stay was denied on July 2, 1984.

ARGUMENT

A. The Stay of Mandate of the District Court Panel Makes This Case Moot.

The issues in this case involve the right to vote in Wisconsin State Senate elections in 1984. Under the stay order of this Court, the state legislative reapportionment plan will be in effect for the 1984 state legislative elections. This means that 174,000 Wisconsin citizens will be deprived of their right to vote in 1984. It is too late to restore those voters' rights for the following reasons:

1. Campaigns for state senate seats are already underway under the legislative plan declared unconstitutional by the District Court. Some of the candidates would be ineligible for office were the District Court sustained because they would not then reside in their state senate district.

2. Neither party in this case has sought a special election to cure the defects in the apportionment plan declared unconstitutional by the District Court. The only issue in this case involves eligibility to vote in the 1984 general election.

For the above reasons, the Court should dismiss the case now before it and vacate the judgment of the three judge panel below.

B. The Question Presented is Substantial

The federal issue in this case is whether, and to what extent, voter participation in state senate elections is protected by the Constitution. Wisconsin law gives a right to vote for state senators once every four years. Because a staggered term system is required by the Wisconsin Constitution, half the state's senators are elected every two years.

When legislative districts are changed, delays of two years are experienced by some voters in state senate districts. Such delays have consistently been sustained by lower federal courts where those delays were an inescapable result of constitutionally required redistricting. See Mader v. Crowell, 498 F. Supp. 226 (M.D. Tenn. 1980); vacated on other grounds, 444 U.S. 505 (1980); Ferrell v. Oklahoma ex rel. Hall, 339 F. Supp. 73 (W.D. Okla. 1972), aff'd mem. sub nom., Ferrell v. Hall, 406 U.S. 939 (1972). No decision sustains a four year delay such as is experienced in this case by voters in districts inhabited by 28,950 persons.

The right to vote for state senators is given by state law, and thereafter strongly protected by the United States Constitution. Only a compelling state interest justifies delay or dilution of

the franchise. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

We do not argue that a state legislature may never revise a court-ordered apportionment plan. We only argue that voting rights once exercised and vested cannot be taken away as they were by the action of the Wisconsin Legislature in 1983. The Legislative reapportionment plan, declared unconstitutional by the District Court in this case:

1. was enacted after an election took place under a valid apportionment plan ordered by the District Court;

2. did not repair any constitutional defects in the court-ordered plan;

3. did not pursue legitimate secondary objectives;

4. deprived 28,950 inhabitants of the right to participate in an election

for state senators for an additional four years (leaving an eight year gap between such elections for the voters).

The legislative reapportionment plan, which the District Court declared unconstitutional, imposed additional durational residence requirements of two and four years on voters in predominantly rural and suburban areas. This Court has invalidated three month durational residence requirements, Dunn v. Blumstein, 405 U.S. 330 (1972). Even a 50 day delay, which was allowed, triggered strong dissents, Marston v. Lewis, 410 U.S. 679 (1973). If delays from 50 to 90 days are suspect then surely delays of two and four years are unconstitutional.

This Court has not squarely addressed the propriety of delaying votes because of redistricting. It has approved, without opinion, district court decisions that

have both allowed, and disallowed, such delays.

In Schaefer v. Thomson, 251 F. Supp. 450 (D.C. Wyoming 1965), aff'd mem. sub nom. Harrison v. Schaefer, 383 U.S. 269 (1969) the District Court found delays in the right to vote for state senators unnecessary, and, on constitutional grounds, ordered all elections for state senators to be held at the same time. However, in Ferrell v. Oklahoma, 339 F. Supp. 73 (W.D. Okla. 1972), aff'd sub nom. Ferrell v. Hall, 406 U.S. 939 (1972) the District Court justified a two-year delay as "unavoidable."

Decisions of the lower courts also conflict, although the differences may be explained by the relative importance of the staggered term requirements of state constitutions. Two decisions avoided postponed voting by ordering all state

senators to be elected at the next election: Petuskey v. Rampton, 243 F. Supp. 365 (D.C. Utah 1965). People v. Kerner, 210 N.E.2d 165 (Illinois 1965). In some states, such as Florida, Illinois, Minnesota, New Jersey and Texas, state law is construed to command that there be elections for the entire state senate following reapportionment. See Florida Constitution, Art. 3 Sec. 15a & 16; Illinois Constitution, Art. 4 Sec. 2 & 3; Minnesota Constitution, Art. 4, Sec. 24. Wisconsin, however, and many other states require that the staggered-term system be retained following reapportionment. In the case before this Court, the parties do not contest the staggered term rules.

Several recent decisions hold that if absolutely necessary a state may justify a delay in the exercise of the franchise for

as much as two years. We have found no decisions justifying a delay of four years as the 1983 Wisconsin plan commands.

The Colorado Supreme Court recently justified a two year delay in the right to vote for state senators:

> "Although reapportionment and election scheduling should preserve wherever possible the opportunity of all citizens to vote for state senator every four years, the complexities of the reapportionment process may result occasionally in a six year delay of the opportunity to vote for state senator. Where this result is absolutely necessary, it does not constitute a constitutional deprivation unless the change is shown to be the result of an invidious discrimination." (emphasis supplied)

In re Reapportionment of the Colorado General Assembly, 647 P.2d 191, 198 (Colorado 1982). The "absolute necessity" test justifies the two year delays in the Wisconsin 1982 plan. None was delayed four additional years. Nevertheless, the 1983 plan created two classes of delayed

voters for state senators. Because the 1983 plan was not necessary to repair constitutional defects, the delays in that plan (eight years elapse for some voters) fail the test of absolute necessity.

Consistent with the absolute necessity test, is the "unavoidable" rule applied in Mader v. Crowell, 498 F. Supp. 226 (M.D. Tenn. 1980). The court there concluded that shifts from odd-numbered to even-numbered senate districts, and a consequent additional two-year delay in the franchise for some voters was "an unavoidable consequence" of a reapportionment necessary to repair constitutional defects. In Wisconsin, unlike Tennessee, the delays are for up to four years, and the delays in Wisconsin were not unavoidable. The unavoidable test was applied in Ferrell v. Oklahoma, 339 F. Supp. 72 (W.D. Okla. 1972), aff'd

mem. sub nom. Ferrell v. Hall, 406 U.S. 939 (1972) wherein a two-year delay was tolerated. Also allowing two years (that is, six year intervals) are Stout v. Bottoroff, 249 F. Supp. 488, 495 (S.D. Ind. 1965); and McCall v. Legislative Assembly, 634 P.2d 223 (Oregon 1981).

The voting rights in this case were simply taken away from 174,000 citizens by the action of the Wisconsin Legislature. This action was both avoidable and unnecessary, and hence was declared unconstitutional by the District Court.

CONCLUSION

It has long been settled that the function of the Judiciary is limited to determining rights that are actually controverted in the particular case before the Court. Where, as here, those rights and obligations are no longer in controversy, it is customary for the case

to be dismissed and to vacate the judgment below.

Having brought the issue of mootness to the Court's attention, Appellees ask in the alternative that the Court give plenary consideration to this appeal, with briefs on the merits and oral arguement.

Dated at Madison, Wisconsin, this 24th day of August, 1984.

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